

**FILED BY CLERK**

**APR 20 2010**

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	
	)	
Appellee,	)	2 CA-CR 2009-0267
	)	DEPARTMENT A
v.	)	
	)	<u>MEMORANDUM DECISION</u>
	)	Not for Publication
CHRISTOPHER ANGELO AMADO,	)	Rule 111, Rules of
	)	the Supreme Court
Appellant.	)	
_____	)	

APPEAL FROM THE SUPERIOR COURT OF GILA COUNTY

Cause No. CR20080240

Honorable Peter J. Cahill, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General  
By Kent E. Cattani and Amy M. Thorson

Tucson  
Attorneys for Appellee

The Law Office of Bret Huggins  
By Bret H. Huggins

Florence  
Attorney for Appellant

ESPINOSA, Presiding Judge.

¶1 After a jury trial, appellant Christopher Amado was convicted of two counts of misconduct involving weapons and one count of possession of marijuana. He

was sentenced to concurrent prison terms, the longest of which was ten years. On appeal, Amado argues the trial court erred by denying his pretrial motion to dismiss the indictment with prejudice and by refusing to instruct the jury pursuant to *State v. Willits*, 96 Ariz. 184, 393 P.2d 274 (1964). For the following reasons, we affirm.

### **Factual Background and Procedural History**

¶2 We view the facts in the light most favorable to sustaining the jury's verdicts. *State v. Speer*, 221 Ariz. 449, n.1, 212 P.3d 787, 790 n.1 (2009). In April 2006, Gila County Deputy Sheriff Jerry Valenzuela saw a vehicle he recognized as Amado's. Believing there was an outstanding warrant for Amado's arrest, Valenzuela followed the vehicle while attempting to confirm its ownership and the existence of a warrant. After Amado drove into a gas station and started fueling his car, Valenzuela received confirmation on both inquiries and arrested him, conducted a pat-down search, and placed him in the back of his patrol vehicle. During the pat-down, Valenzuela found four shotgun shells in Amado's front pocket. Valenzuela then searched Amado's vehicle and found a sawed-off shotgun and marijuana.

¶3 Amado was thereafter charged for these offenses, released on his own recognizance, and transferred to Maricopa County on the outstanding warrant. He entered a guilty plea on the Maricopa charges and was sentenced to the Arizona Department of Corrections. Amado was not indicted on the weapons and marijuana charges until April 2008, at which time he was still incarcerated. After a series of pretrial events, a trial date was set for February 11, 2009, and at Amado's counsel's request, later rescheduled to April 8, 2009.

¶4 Over Amado’s objection, the trial court granted the state’s motion to continue the trial from April to May because Valenzuela had been scheduled for back surgery. In support of its motion, the state had explained Valenzuela was in “sheer agony all the time” and his health insurance might soon expire due to his pending disability retirement application. Amado subsequently moved to dismiss the case with prejudice based upon both pre-indictment delay and the continuance of his trial. After a hearing, the trial court denied his motion.

¶5 During trial, the court denied Amado’s request for a *Willits* instruction based on the state’s failure to obtain a gas station surveillance video and its failure to test items taken from his vehicle for fingerprints. Amado was subsequently convicted and sentenced as outlined above and the trial court ordered that his sentences be served consecutively to the prison terms he was already serving. We have jurisdiction pursuant to A.R.S. §§ 12-120.21(A)(1), 13-4031, and 13-4033(A)(1).

## **Discussion**

### **Due Process Violation**

¶6 Amado first argues the trial court erred in denying his motion to dismiss the indictment based on pre-indictment delay because he was “denied a speedy trial under the Due Process Clauses of the United States and Arizona Constitutions.”<sup>1</sup> “Separate and

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<sup>1</sup>In response to the state’s contention that Amado failed to raise this argument below and therefore is entitled only to fundamental error review, Amado asserts that he raised this issue during oral argument on his motion to dismiss. In our discretion, we will accept the fleeting reference reflected in the record as sufficient to have preserved the issue for appeal.

apart from any speedy trial rights [guaranteed under the Sixth Amendment], ‘the Due Process Clause has a limited role to play in protecting against oppressive delay.’” *State v. Lemming*, 188 Ariz. 459, 462, 937 P.2d 381, 384 (App. 1997), *quoting United States v. Lovasco*, 431 U.S. 783, 789 (1977); *see also State v. Broughton*, 156 Ariz. 394, 397, 752 P.2d 483, 486 (1988) (same). “Under [*United States v.*] *Marion*, [404 U.S. 307 (1971),] actual prejudice is necessary to establish a due process violation, and intentional delay by the prosecution to gain a tactical advantage would require dismissal of the charges.” *Lemming*, 188 Ariz. at 462, 937 P.2d at 384. Accordingly, “Arizona courts have interpreted *Marion* and *Lovasco* to require that a defendant show intentional delay by the prosecution to obtain a tactical advantage, and actual and substantial prejudice as a result of the delay.” *Id.*; *see also State v. Dunlap*, 187 Ariz. 441, 450, 930 P.2d 518, 527 (App. 1996).<sup>2</sup> We review the court’s denial of a motion to dismiss for an abuse of discretion. *See Lemming*, 188 Ariz. at 460, 937 P.2d at 382.

¶7 Amado has failed to establish a due process violation under this two-pronged test. First, he has failed to demonstrate the state “intentionally delayed to gain a tactical advantage.” *Lemming*, 188 Ariz. at 462, 937 P.2d at 384. Although he points to the fact that the prosecutor’s office only brought these charges after two unsuccessful

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<sup>2</sup>Because these cases have interpreted the due process requirements under both the federal and state constitutions, Amado’s criticism of the state’s reliance on Arizona cases is unfounded. To the extent Amado may seek to have this court overturn our supreme court’s case law interpreting federal requirements, we are without authority to do so, *see State v. Stanley*, 217 Ariz. 253, ¶ 28, 172 P.3d 848, 854 (App. 2007), nor does he explain how these prior interpretations were incorrect. In addition, because he has explicitly limited his argument to the alleged due process violation, his citation to and reliance on cases interpreting the Sixth Amendment are inapposite.

attempts to prosecute him on other charges, he has failed to show that any such delay, if indeed intentional, was to gain a tactical advantage over him. *See Dunlap*, 187 Ariz. at 449-50, 930 P.2d at 526-27 (no evidence ten-year delay was intended to gain tactical advantage over defendant).

¶8 Moreover, even assuming Amado could establish the first prong, he has also failed to show “actual and substantial prejudice.” *Lemming*, 188 Ariz. at 462, 937 P.2d at 384. “[A] defendant has a heavy burden to prove that pre-indictment delay caused actual prejudice; the proof must be definite and not speculative.” *Dunlap*, 187 Ariz. at 450, 930 P.2d at 527, *quoting Broughton*, 156 Ariz. at 397-98, 752 P.2d at 486-87. Amado argues the delay “denied [him] the ability to develop a strong defense based upon the theory that he was framed” and claims “[t]he surveillance tape, in particular, was critical.”

¶9 Even had there been no pre-indictment delay, however, it is unclear whether Amado would have been able to obtain the gas station’s surveillance video. Deputy Valenzuela testified he did not know how long the gas station kept surveillance tapes, and Amado offered no additional evidence on this subject. In addition, Amado’s assertion that the video might have shown the deputy or others planting the marijuana and sawed-off shotgun in his car is entirely speculative. *See Broughton*, 156 Ariz. at 398, 752 P.2d at 487 (rejecting claim that defendant’s due process rights were violated by pre-indictment delay due to destruction of disciplinary hearing tapes where defendant’s reliance on tapes was “wholly speculative”); *State v. Medina*, 190 Ariz. 418, 422, 949 P.2d 507, 511 (App. 1997) (defendant’s showing of some prejudice “d[id] not rise to the

actual and substantial prejudice that mandates a dismissal”); *Lemming*, 188 Ariz. at 463, 937 P.2d at 385 (defendant failed to show actual and substantial prejudice where missing witnesses’ testimony “would have been of marginal relevance”); *Dunlap*, 187 Ariz. at 451, 930 P.2d at 528 (defendant failed to establish prejudice when his claim that lost or destroyed documents “may have contained exculpatory evidence” was “based on conjecture”).<sup>3</sup>

¶10 Accordingly, because Amado has failed to establish both that the state caused the delay to gain a tactical advantage and that the requisite prejudice resulted from the delay, we cannot say the trial court erred in denying Amado’s motion to dismiss the indictment on due process grounds.

#### **Right to Speedy Trial Under Rule 8.3(b)**

¶11 Amado next argues the trial court erred in denying his motion to dismiss on the ground he was denied his right to a speedy trial under Rule 8.3, Ariz. R. Crim. P. Under this rule, “[a]ny person who is imprisoned in this state may request final disposition of any untried indictment, information or complaint pending against the person in this state.” Ariz. R. Crim. P. 8.3(b)(1). When such a request is in writing and addressed to the appropriate court and prosecutor, it requires that the prisoner be brought

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<sup>3</sup>Amado also asserts he was prejudiced by the pre-indictment delay because without it he would have been able to request that items taken from his vehicle be tested for fingerprints, and he might have received sentences that would have been concurrent with the ones he was already serving. But he has failed to develop these arguments with adequate discussion and authority and therefore has waived them on appeal. *See State v. Cons*, 208 Ariz. 409, ¶ 18, 94 P.3d 609, 616 (App. 2004) (argument not properly developed waived).

to trial within ninety days. Ariz. R. Crim. P. 8.3(b)(1), (3). Amado claims his oral request on February 2, 2009, for the trial court to set a new trial date constituted a Rule 8.3(b) request and that the state's failure to bring him to trial within the next ninety days violated his right to a speedy trial.<sup>4</sup>

¶12 The state counters there was no Rule 8.3 violation because Amado's request for a continuance on February 2 was not a Rule 8.3(b) request for disposition of an untried indictment, but instead was merely a request to continue the trial date. It further contends that, even assuming the request for a continuance could be construed as a Rule 8.3(b) request, it was not a written request as required by the rule.

¶13 We need not resolve these issues because, even assuming that Amado's February 2 request for a continuance constituted a Rule 8.3(b) request and did not have to be in writing, Amado nevertheless cannot demonstrate a Rule 8.3 violation. As the state correctly explains, assuming the ninety-day limit began to run on February 2, the time period between February 2 and the new trial date of April 8 was excluded time because Amado's counsel requested the continuance in order to conduct witness examinations. *See* Ariz. R. Crim. P. 8.4 (“[d]elays occasioned by or on behalf of the defendant” excluded from computation of time under Rule 8.3); *State v. Burrus*, 134 Ariz. 251, 252-53, 655 P.2d 371, 372-73 (App. 1982) (excluding time occasioned by defendant's request for extension). Excluding this time period, Amado was still brought to trial

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<sup>4</sup>Amado's trial began on June 30, 2009.

within eighty-three days of his February 2 request. Thus, there was no violation of Rule 8.3(b).<sup>5</sup>

### ***Willits* Instruction**

¶14 Amado next argues the trial court committed reversible error by refusing his request for a *Willits* instruction based on the state’s failure to obtain the gas station surveillance video.<sup>6</sup> We review the court’s refusal to give a *Willits* instruction for an abuse of discretion. *Speer*, 221 Ariz. 449, ¶ 39, 212 P.3d at 795. The instruction allows the jury to infer that missing evidence would have been exculpatory and is appropriate “[w]hen police negligently fail to preserve potentially exculpatory evidence.” *State v. Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d 75, 93 (1999). “To receive a *Willits* instruction, the ‘defendant must show (1) that the state failed to preserve material and reasonably accessible evidence having a tendency to exonerate him, and (2) that this

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<sup>5</sup>The start of the excluded time period arguably could also be calculated from February 11, the day the trial was scheduled to begin. Compare *State v. Armenta*, 25 Ariz. App. 62, 63, 540 P.2d 1281, 1282 (1975) (using date defendant requested continuance as start date for excluded time), with *Burrus*, 134 Ariz. at 252-53, 655 P.2d at 372-73 (applying original trial date to compute excluded time). But even using this date, there is no Rule 8.3(b) violation because the trial court had discretion to grant the continuance based on Valenzuela’s medical condition and impending surgery. See *State v. Henry*, 176 Ariz. 569, 578, 863 P.2d 861, 870 (1993) (grant of continuance reviewed for abuse of discretion); *State v. Lukezic*, 143 Ariz. 60, 71, 691 P.2d 1088, 1099 (1984) (no abuse of discretion in granting continuance based on unforeseen illness of trial judge); *State v. Vasko*, 193 Ariz. 142, ¶¶ 10-11, 971 P.2d 189, 191-92 (App. 1998) (upholding continuance under Rule 8.5 where arresting officer was unavailable due to Army Reserve training); *State v. LaBarre*, 114 Ariz. 440, 444, 561 P.2d 764, 768 (App. 1977) (continuance justified by hospitalization of material witness for state).

<sup>6</sup>Amado has abandoned his argument as it related to the state’s failure to test the items taken from his vehicle for fingerprints.



failure resulted in prejudice.’” *Speer*, 221 Ariz. 449, ¶ 40, 212 P.3d at 795, *quoting State v. Murray*, 184 Ariz. 9, 33, 906 P.2d 542, 566 (1995). ““A trial court does not abuse its discretion by denying a request for a *Willits* instruction when a defendant fails to establish that the lost evidence would have had a tendency to exonerate him.”” *Id.*, *quoting Fulminante*, 193 Ariz. 485, ¶ 62, 975 P.2d at 93.

¶15 We cannot say the trial court abused its discretion in denying Amado’s requested *Willits* instruction. Even assuming that the videotape was material evidence, Amado has failed to establish that it had a tendency to exonerate him or that the state’s failure to obtain it resulted in prejudice. As the state points out, Amado’s claim that the videotape would have shown the police planting evidence in his vehicle was wholly speculative, which is insufficient for a *Willits* instruction.<sup>7</sup> *See Fulminante*, 193 Ariz. 485, ¶ 63, 975 P.2d at 503 (evidence defendant claimed might have supported his alibi was “highly questionable at best” due to contrary witness testimony; trial court did not abuse its discretion in refusing to give *Willits* instruction); *State v. Perez*, 141 Ariz. 459, 464, 687 P.2d 1214, 1219 (1984) (denial of *Willits* instruction affirmed because defendant had failed to demonstrate destroyed videotape of robbery would have proven his mistaken identity defense); *State v. Wooten*, 193 Ariz. 357, ¶¶ 62-63, 972 P.2d 993, 1004-05 (App. 1998) (trial court did not abuse its discretion in refusing *Willits* instruction

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<sup>7</sup>Although Amado points to inconsistencies in Valenzuela’s testimony concerning the location of the evidence in his vehicle and the night’s sequence of events, he does not explain how such inconsistencies are evidence of a conspiracy to plant evidence.

based on state's failure to preserve recordings of defendant's telephone calls where defendant failed to show they contained exculpatory evidence); *Dunlap*, 187 Ariz. at 464, 930 P.2d at 541 (defendant not entitled to *Willits* instruction because claim that missing evidence would have supported his theory of case was "entirely speculative"); *see also* *State v. Tyler*, 149 Ariz. 312, 317, 718 P.2d 214, 219 (App. 1986) (no entitlement to *Willits* instruction because officer "had no reason to know what the defendant's defense would be"); *State v. Willcoxson*, 156 Ariz. 343, 346, 751 P.2d 1385, 1388 (App. 1987) ("failure to pursue every lead or gather every conceivable bit of physical evidence" does not require *Willits* instruction). Accordingly, the trial court was within its discretion to deny a *Willits* instruction.

### Disposition

¶16 For the foregoing reasons, Amado's convictions and sentences are affirmed.

/s/ Philip G. Espinosa

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard

JOSEPH W. HOWARD, Chief Judge

/s/ Virginia C. Kelly

VIRGINIA C. KELLY, Judge